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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 951

FRANK SCHWARZ, PER SE AND AS AGENT AND FOR THE USE AND BENEFIT OF WM. KOTEK AND WM. MEROSHEK,
Petitioner,

v.

WITWER GROCER COMPANY, A CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

JOHN D. RANDALL,
Counsel for Petitioner.

INDEX.

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	2
Statement	3
Reasons for granting the writ	6
Conclusion	12
Appendix	13

CITATIONS.

Cases:	
Bowie v. *Gonzalez*, 117 F. (2d) 11 (C. C. A. 1)	12
Calaf v. *Gonzalez*, 127 F. (2d) 934 (C. C. A. 1)	12
Fleming v. *Jacksonville Paper Co.*, 128 F. (2d) 395	10
Guess v. *Montague*, 140 F. (2d) 500	8
Kirschbaum v. *Walling*, 86 L. Ed. 1638, 316 U. S. 517	9
Mid-Continent Pipe Line Co. v. *Hargrave*, 129 F. (2d) 655	12
Overnight Motor Transportation Co. v. *William H. Missel*, 86 L. Ed. 1682	9
Supercold Southwest Co. v. *McBride*, 124 F. (2d) 90	8
Walling v. *Jacksonville Paper Co.*, 87 L. Ed. 460, 317 U. S. 564	9, 12
Statute:	
Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C. 201 et seq.:	
Sec. 3 (b)	13
Sec. 6	13
Sec. 7	13
Sec. 11 (c)	13

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Frank Schwarz, per se, and as agent and for the use and benefit of Wm. Kotek and Wm. Meroshek, Petitioner, prays that a writ of certiorari issue to review the judgment entered in this case by the United States Circuit Court of Appeals for the Eighth Circuit on March 9, 1944.

Opinions Below.

The findings of fact and conclusions of law entered by the district court are a part of its opinion and are printed at R. 29-30. Judgment was entered thereon, which judgment is printed at R. 31. This opinion is reported at 49 Federal Supplement 1003. The opinion of the Circuit

Court of Appeals is printed at R. 39-45 and will be published in the Federal Reporter Advance Sheets, issue of May 8, 1944.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on March 9, 1944 (R. 45-46). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Questions Presented.

1. Whether the employees in the central warehouse of a large wholesale grocer, with six branch warehouses located in two states, and serving retailers in at least four states, who handle merchandise shipped into the warehouse from out of the state and handle merchandise for shipment to out of state retailers, have made a prima facie case by showing the interstate character of the employer's activities and that they are engaged in the handling of merchandise so shipped into and distributed by such central warehouse.

2. Whether an employee who engages in interstate as well as intrastate activities during a work week has the burden of proving the number of hours he spent in interstate commerce, and the number of hours spent in intrastate commerce, and could recover for only the time actually spent in interstate commerce, and not for all hours worked in the work week.

Statute Involved.

The pertinent provisions of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C., sec. 201 are set forth in the Appendix, p. 13, infra.

Statement.

The petitioner and his fellow employees were employed by the respondent company, a wholesale grocer, at its central warehouse in Cedar Rapids, Iowa. The respondent had six branch warehouses, in Mason City, Iowa; Iowa City, Iowa; Ottumwa, Iowa; Davenport, Iowa; Marshalltown, Iowa; and in Madison, Wisconsin (R. 10-11). It also operated a food processing and manufacturing plant in a separate building in Cedar Rapids, Iowa, under the name of I. O. A. Foods (R. 10). At its Cedar Rapids warehouse the respondent company secures and unloads beer from Peoria, Illinois and Milwaukee, Wisconsin; bananas, and canned goods from Iowa, California and Minnesota (R. 14). At the Cedar Rapids warehouse there is railway trackage adjoining the warehouse as well as terminal trackage near the warehouse (R. 14). The respondent operates twenty trucks out of the Cedar Rapids branch, and ships merchandise from the Cedar Rapids warehouse to the other branches. The merchandise comes in carloads to the Cedar Rapids branch, is broken up and shipped to the other branches (R. 14-15). The delivery to the respondent company's branches is all in their own trucks, although if the respondent doesn't have a truck, they use a common carrier (R. 15).

The branch of respondent company at Mason City, Iowa served customers in southern Minnesota (R. 15). The respondent's Davenport branch served customers in Illinois (R. 15). The food processing plant, under the trade name of I. O. A. Foods, manufactured salad dressing, roasted coffee and made extracts; and this food processing plant secured peanuts from Texas, oil from Penick & Ford and imported coffee. This merchandise from the processing plant was taken to the Cedar Rapids warehouse and

shipped to other branches, or it might be shipped directly from the factory to the branch (R. 16). Some of the merchandise coming into the Cedar Rapids warehouse came from places in Iowa. There were sixty employees in the Cedar Rapids warehouse (R. 17). Frank Schwarz worked on the "city gang", that is, loading city trucks; and in that connection, many times he had to go to the railway cars to pick up groceries that hadn't been unloaded from the terminal track; and when there was any slack time, he helped the "unloading gang" in unloading trucks and railway cars from the terminal tracks (R. 17). Wm. Kotek loaded country trucks with groceries from the Cedar Rapids warehouse, and also unloaded railway cars. These railway cars which he helped to unload were all shipments from other states, such as beer from Peoria, bananas from out of the state and canned goods. He also loaded for other branch houses, but his primary job was loading country trucks. Wm. Meroshek loaded city trucks, and when there wasn't sufficient merchandise at the warehouse, they went to railway cars which came from Illinois, Wisconsin and Minnesota and got the merchandise for their orders. When they didn't put up their orders, they unloaded railway cars such as cars of beer from Peoria, bananas, and canned goods from Minnesota and California (R. 20-21). The respondent introduced no testimony (R. 21).

There is no question but that the petitioner and the two employees for whom he is agent were entitled to addtional compensation under the Act, if they were covered by the Act (R. 26-29).

Upon the above record, the district court found that the respondent "was undoubtedly engaged in commerce substantially, but was also substantially in intrastate commerce, indeed to a greater extent than in interstate com-

merce" (R. 29-30). The district court further stated in its opinion:

> "None of the plaintiffs seem able to testify, at least they did not testify how often they helped in interstate work, nor how long or to what extent they helped. They did not locate the time either of any particular week or month. There is an entire absence of testimony upon which to base a recovery for any particular amount in any particular week or month.
>
> "The weight of authority clearly indicates that when the employee works both in intrastate and interstate commerce, the burden is upon him to point out what part of his work was in intrastate and what part in interstate commerce, and the extent of the interstate work and when performed. I find no decision directly in point from the Circuit Court of Appeals of the Eighth Circuit. The question is well settled, however, in the Fifth Circuit. Supercold Southwest Co. v. McBride, 124 F. 2d 90, United States Circuit Court of Appeals, Fifth Circuit, Opinion by Circuit Judge Hutcheson; also White Motor Co. v. Littleton, 124 F. 2d 92, United States Circuit Court of Appeals, Fifth Circuit, concurring opinion by Circuit Judge Hutcheson. In the Western District of Missouri of the Eighth Circuit, Judge Reeves in the case of Jones v. Springfield, Missouri Packing Co., 45 F. Supp. 997, cites and follows the Fifth Circuit cases supra.
>
> "I therefore conclude that plaintiffs have failed to adduce testimony to sustain their burden of proof, and that the judgment must go for the defendant, and it will be so ordered."

On appeal, the Circuit Court of Appeals affirmed (R. 45-56). The Circuit Court based its decision on the ground that neither the petitioner nor his two fellow employees had sustained the burden of proving that he was an employee engaged in interstate commerce, and how many hours he had been so engaged (R. 39-45).

Reasons for Granting the Writ.

This case presents the question of whether employees in the central warehouse of a wholesale grocer, with six other branch warehouses, have sustained the burden of proving a prima facie case by showing the interstate character of the wholesaler's activities, and by showing that the work in which they were engaged included not only interstate commerce, but also intrastate commerce, when such employees do not specify the exact amount of time they spent in interstate commerce. The employer introduced no evidence.

The case also presents the question of whether an employee who is engaged in both interstate and intrastate commerce has the burden of proving the exact amount of time of any particular week or month that he was engaged in intrastate commerce, and the exact amount of time he was engaged in interstate commerce, where the time spent by him was under the direction of the employer, and the employee was under the complete control of the employer.

The importance of the determination of these questions is obvious. Necessarily the benefit of the Act were to be extended to every employee who was "engaged in commerce or in the production of goods for commerce." If every employee so engaged is to secure the benefit of the Act, then the Act should be interpreted so as to require from the employer a full and good faith disclosure as to its activities, as well as the activities of its employees working under its direction.

In the instant case, there were sixty employees in the Cedar Rapids warehouse of this wholesale grocery company, and the employees were, according to the record, divided into "gangs." The constant movement of the goods is indicated by the fact that the uncontradicted evidence showed that the employees had to go to railway cars stand-

ing on tracks adjacent to the warehouse to secure merchandise to fill orders. It is reasonable therefore to infer that the operation of this wholesale grocery business was conducted with the view of having its central warehouse as merely a convenient method for the distribution of merchandise to its branch houses and to the retail grocers in the territory which it served, and shows that the merchandise did not pause in the warehouse.

There would, therefore, be no hesitation in the movement of the goods in interstate commerce under the record made in this case which would permit the finding of fact that these employees (petitioner) were not engaged in interstate commerce.

Further, these employees were required not only to service trucks handling local distribution and trucks conveying merchandise to branch houses, but also to unload railway cars bringing merchandise in from other states.

If the respondent had desired, and if it were a fact that he segregated the employees in the Cedar Rapids warehouse for the purpose of having certain groups of employees work solely in connection with intrastate commerce, and others handle interstate commerce, then certainly such a showing should be required of him, even though the burden was upon the petitioner.

To effectuate the intent of Congress, the Act should be made workable so that an employee whose means and ability to produce evidence are necessarily limited would have the same opportunity to secure redress as would the Administrator of the Act. A holding such as the one in the instant case would necessitate the employment of a corps of lawyers to delve into the details of the activities of an employer engaged in both interstate and intrastate commerce, and would virtually prevent an individual employee without means from securing the benefit of the Act.

The instant case will require an employee to keep books as to every minute of every hour, every hour of every day, every day of every week and every week of every month, in order to prove the time he was actually engaged in interstate commerce, if his employer is engaged in both interstate and intrastate commerce. This will place such an unreasonable burden upon the employee that it will make it impossible for him to obtain a recovery without the assistance of the Administrator, and the benefits of the Act will necessarily be restricted to those fortunate employees who are able to secure the assistance of the Administrator.

The court below apparently utterly ignored two of the legal propositions strenuously urged by the petitioner; that is, first, the question of whether or not the employee had made a prima facie case; second, whether the petitioner must specify the exact number of hours worked in interstate commerce.

Neither the district court nor the Circuit Court denied that the petitioners were engaged in interstate, as well as intrastate, commerce. The district court based its holding upon the failure of the petitioner and his fellow employees to point out the particular week or month, and the time of that particular week or month, during which they were engaged in interstate work (R. 30). The Circuit Court asserted that the petitioner and his fellow employees "only proved that a very incidental part of their activities was in such commerce" (R. 45).

The precedent relied upon by the district court and by the Circuit Court of Appeals is the case of *Super-Cold Southwest Co.* v. *McBride*, 124 F. 2d 90, decided by the Circuit Court of Appeals for the Fifth Circuit on December 1, 1941. Both the district and the Circuit Court utterly ignored he case of *Guess* v. *Montague*, 140 F. 2d 500, decided by the Fourth Circuit Court of Appeals on September 16, 1943, which was cited and relied upon by the peti-

tioner. The *Guess* case, supra, was decided subsequent to the *Super-Cold* case, and subsequent to the time the Supreme Court handed down its decision in *Kirschbaum* v. *Walling,* 86 L .Ed. 1638, 316 U. S. 517; *Walling* v. *Jacksonville Paper Co.,* 87 L. Ed. 460, 317 U. S. 564; and *Overnight Motor Transportation Co., Inc.* v. *William H. Missel,* 86 L. Ed. 1682, 316 U. S. 572.

The citation of these cases, decided by the Supreme Court subsequent to December 1, 1941, is not because such cases are in point on the question of the burden of proof, but to show that the decision of the Fifth Circuit in the *Supercold* case was made prior to the time the Fifth Circuit Court of Appeals had the benefit of the general interpretation of the Act by the Supreme Court in the cases cited. The *Guess* case is directly in conflict with the *Supercold* case, and is based upon the same liberal interpretation of the Act as the decisions of the Supreme Court listed above.

In the *Guess* case, the court held that, whether the employee rendered any services in connection with the interstate business of the employer during certain work weeks, was a matter peculiarly within the knowledge of the employer, and that the employees could not be expected to furnish proof with respect thereto. The petitioner and his fellow employees, having made a prima facie case by showing that the respondent was engaged in interstate, as well as intrastate, commerce, and that their duties included both interstate and intrastate activities, the burden of producing the proof of whether or not the particular employees had been segregated to handle only intrastate commerce should have been upon the employer. The decision of the district court in this case was a virtual direction of the verdict in favor of the respondent. Therefore, the *Guess* case is analogous with the instant case. The decision of the Circuit Court of Appeals in the instant case, having been based upon the precedent of the *Supercold* case, which

has been discredited in principle by subsequent decisions of the Supreme Court, and which case is in direct conflict with the *Guess* case, and is contrary to the interpretation of the Act by the Administrator, is erroneous.[1]

The court below wholly failed to give effect to the broad purposes of the Act and the broad and practical principles established by the decisions of the Supreme Court subsequent to the *Supercold* case.

The petitioner and his fellow employees, having shown that their employer was engaged in interstate commerce as well as intrastate commerce, and that they were engaged in interstate commerce as well as intrastate commerce, and it not being shown that the employer made any differentiation in the hours worked or the rates of pay within the Cedar Rapids warehouse, had made a prima facie case, and the burden of producing proof that they spent only an infinitesimal part of their time in interstate commerce should be placed upon the respondent. The conflict between the Fifth Circuit (*Supercold* case) and the Fourth Circuit (*Guess* case) as to the burden of proof should be resolved by this Court.

2. The decision below is also entirely inconsistent with the specific holding of the court in the case of *Walling* v. *Jacksonville Paper Company, supra.* In that case, the Fifth Circuit (*Fleming* v. *Jacksonville Paper Co.*, 128 F. 2d 395) repudiated the *Supercold* decision, and held that an employee's whole time and work need not be in commerce because the Act does not make any distinction of that sort, and this language was approved by the Supreme Court in the *Jacksonville Paper Company case, supra.* The court below therefore erred in holding that the petitioner could recover for only the time actually spent in commerce.

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[1] See Interpretative Bulletin No. 1, Paragraph 5; 1942 Wage Hour Manual, 28 Cf. Section 15(b) of the Act.

The application of what the court below conceived to be the rule of the *Supercold* case caused it to hold that, notwithstanding the fact that the petitioner and his fellow employees were in interstate commerce when they loaded extrastate goods from railway cars and loaded trucks with extrastate goods moving to respondent's own branch warehouses, the petitioner could not recover, in the absence of proof of precisely what part of his work was in intrastate commerce and what part in interstate commerce.

The respondent had control of all sixty employees in its Cedar Rapids warehouse, and it is fair to infer that, where no distinction was made as to wages (at least this is a fair inference to be drawn from the record), it would be virtually impossible for an employee to specify the time which he actually spent in the handling of interstate orders. If the rule of the instant case is followed, it will be impossible for an employee of a corporation which engages in interstate as well as intrastate commerce, whose duties make it necessary for him to perform services in interstate as well as intrastate commerce, to recover under the Act.

The court below would require not only a showing that respondent's employee unloaded railway cars, but also a showing as to the origin of the merchandise. Further, the court below would require an employee to prove not only that he loaded trucks to go to the respondent's branches, but also to which branch house the truck was routed; and if the opinion were followed literally, the employee would have to prove that the merchandise in that truck was sold and delivered to out-of-state retailers. These illustrations, while extreme, nevertheless indicate the unreasonable burden which the court below would place upon an employee. We can well imagine how long the warehouse employee would last if he attempted to keep track of the merchandise which he unloaded from a railway car, the merchandise which he loaded in a truck, and also write

down the number of hours he spent each day in connection with merchandise in interstate commerce. This obviously would place a most unreasonable burden upon the employee.

Further, if the holding in the instant case is followed, an employer could have an employee work for forty hours or less in interstate commerce and for twenty hours in intrastate commerce during each work week, and he would not be violating the Act. The doctrine of the *Supercold* has been disapproved and rejected in a majority of the other circuits.[2] The *Supercold* decision and the decision in the instant case conflict with the decision of the Fourth Circuit Court of Appeals in the *Guess* case, supra; and of the Tenth Circuit Court of Appeals in the *Mid-Continent Pipeline Co.* case, *supra;* and of the First Circuit Court of Appeals in *Bowie* v. *Gonzales, supra;* and, in addition, is contrary to the broad general principle and language approved by the Supreme Court when it modified and affirmed the case of *Fleming* v. *Jacksonville Paper Co., supra.*[3]

Conclusion.

The decision of the court below is incorrect, and is in conflict with the decisions of the other circuit courts as has been heretofore pointed out, and the questions involved are of such general importance as to require exercise of the jurisdiction of this Court. Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted.

JOHN D. RANDALL,
Attorney for Petitioner.

May, 1944.

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[2] The following cases are typical, but by no means exhaustive of those in which the doctrine is disapproved:
Guess v. *Montague,* 6 Wage Hour Rept. 934 (C. C. A. 4, 1943).
Mid-Continent Pipe Line Co. v. *Hargrave,* 129 F. (2d) 655.
Bowie v. *Gonzalez,* 117 F. (2d) 11.
Calaf v. *Gonzalez,* 127 F. (2d) 934.

[3] *Walling* v. *Jacksonville Paper Co.,* 317 U. S. 564 at 571-572.

APPENDIX.

The pertinent provisions of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060 (29 U. S. C., sections 201 et seq.), read as follows:

Sec. 3 (b). "Commerce" means trade, commerce, transportation, transmission, or communication among the several states or from any state to any place outside thereof.

* * * * * * *

Sec. 6 (a). Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

* * * * * * *

Sec. 7 (a). No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerec or in the production of goods for commerce—

* * * * * * *

Sec. 11 (c). Every employer subject to any provisions of sections 201-219 of this title or of any order issued under this chapter shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of sections 201-219 of this title or the regulations or orders thereunder.

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Respondent.

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RESPONDENT'S BRIEF.

STEWART HOLMES,
Counsel for Respondent.

INDEX.

	Page
Statement	1
Reasons for denying the Writ	2

CITATIONS.

Cases:

Guess v. *Montague*, 140 F. (2d) 500	4
Kirschbaum v. *Walling*, 316 U. S. 517	3
Walling v. *Jacksonville Paper Co.*, 317 U. S. 564	3
Warren—Bradshaw Drilling Co. v. *Hall*, 317 U. S. 88	3

Statute:

29 U. S. C. A., Sec. 206, 207	3

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RESPONDENT'S BRIEF.

Respondent prays that the Petition for Writ of Certiorari be denied.

Statement.

Respondent submits that the Statement of Petitioner does not conform to the Findings of Fact. The cause was tried to the Court without a jury. The trial court made Findings of Fact, which the United States Circuit Court of Appeals held were amply supported by the evidence, stating (R. pages 40-41):

"The facts found were these: (1) Defendant is engaged in the wholesale grocery business with its principal plant at Cedar Rapids, Iowa; (2) The defendant handles some

commodities shipped into its warehouse at Cedar Rapids from states other than Iowa; (3) The greater part of defendant's business was selling and distributing goods from its warehouse in Cedar Rapids to Iowa retailers; they were in part loaded by defendant on trucks at the warehouse and so transported by the defendant to retailers in Iowa and in part loaded by defendant on the trucks of customers to be carried away by them; (4) Defendant's employees were assigned to 'gangs'—(a) 'the city gang' which loaded goods from defendant's warehouse for distribution locally to retailers, (b) 'the call gang,' which loaded goods from defendant's warehouse on the trucks of Iowa customers, and (c) 'the unloading gang,' which unloaded interstate shipments from railway cars; (5) The workmen seeking recovery in this proceeding were primarily employed in the 'city gang' and 'the call gang' but 'occasionally,' when they were not busy 'in their own line of work' they assisted 'the unloading gang,' but when they did that or how much time they gave to that work does not appear. The Findings of Fact made by the district court unless clearly erroneous, will be taken by this court as the facts. A review of the record convinces us that the findings were supported amply by the evidence."

Reasons for Denying the Writ.

Respondent urges that, the decision of the United States Circuit Court of Appeals reported in 141 F. 2nd 341 follows the decisions of this Court; is not in conflict with a decision of another Circuit Court of Appeals; no purpose would be served for this Court to assume jurisdiction of this cause, and therefore the Petition should be denied.

I.

Respondent submits that the Petitioner in framing his first question does not accurately state an issue arising

from this cause. His inquiry does not disclose, as appears in the Findings of Fact, that Petitioner and his principals were primarily engaged as "loaders" loading for local delivery, merchandise that had come to rest in the warehouse and that only occasionally they, in segregated activities assisted "unloaders" in Interstate Commerce. Petitioner bases his whole brief upon his incomplete inquiry. The question should be:

(1) Whether the Petitioner has the burden of proving that he and his principals were substantially engaged in Interstate Commerce, and failed to sustain that burden, when the Findings of Fact, found by the United States Circuit Court of Appeals to be amply supported by the record, were that the Petitioner and his principals were primarily engaged as "loaders" in Intrastate Commerce and only occasionally or incidently, for indefinite periods and at indefinite times in segregated activities assisted "unloaders" in Interstate Commerce.

The Findings of Fact (R. pages 40-41) (Respondent's Statement) discloses that: the Petitioner and his principals were primarily engaged as "loaders" loading for local delivery merchandise that had come to rest in the warehouse; there was no evidence that any of such merchandise was received on special order or received pursuant to previous contracts or any facts which indicated a practical continuity of movement of goods; only *occasionally* or incidentally for indefinite times and for indefinite periods they assisted the "unloading gang" in unloading Interstate merchandise, but that was not their regular duties.

The Act itself (Sections 6 and 7 of the Fair Labor Standards Act, 29 U. S. C. A. Sec. 206, 207) states and this Court held, in *Kirschbaum* v. *Walling* 316 U. S. 517, *Warren-Bradshaw Drilling Co.* v. *Hall* 317 U. S. 88, *Walling* v. *Jacksonville Paper Company* 317 U. S. 564 that it applies only

to those employees that are engaged in Interstate Commerce or in the production of goods for Interstate Commerce. It is immaterial whether the employer may or may not be in Interstate Commerce in some of its other activities through other employees.

In *Walling* v. *Jacksonville Paper Company, supra*, the Court states that the Act applies only "if a substantial part of an employee's activities related to goods whose movement in the channels of Interstate Commerce was established by the test we have described" and then held that a wholesaler's employees loading, for local delivery, merchandise that had come to rest in the warehouse, and not received as special orders or pursuant to a previous contract, or had a practical continuity of movement were not engaged in Interstate Commerce.

The Court in *Warren-Bradshaw Drilling Co.* v. *Hall supra* held that the burden was on the employee to prove that he was substantially engaged in Interstate Commerce.

Petitioner cites the case of *Guess* v. *Montague* 140 Fed. 2nd. 500 as a decision of another Circuit Court of Appeals in conflict with the case at bar and for that reason asks this Court to assume jurisdiction of this cause. They can be distinguished. In the *Guess* case the employer was engaged in rehabilitating machinery, some of which was sold outside the State. The Plaintiff, a mechanic, was employed in the production of goods. The record showed some, but not how much of the merchandise was sold out of the State. The Court held that was peculiarly in the knowledge of the employer and distinguishes those facts from those here, where the Interstate and the Intrastate duties were segregated. In the case at bar Petitioner and his principals were employed primarily in the "loading gang" in Intrastate Commerce, only occasionally assisting the "loading gang"

in Interstate Commerce. These were segregated activities. Whether the Petitioner and his principals were substantially engaged in Interstate Commerce was as much or more in their knowledge as in that of the employer.

In the case at bar there was no evidence whether the Petitioner and his principals performed Interstate duties one minute a day or one hour a week. As there was nothing in the record indicating even approximately how much of their time was so spent, there was no evidence from which a Court could find that such employment was substantial. To conclude anything is substantial it must appear approximately how much it is. As the Findings of Fact state that the Petitioner's and his principals' Interstate services were only *occasional* or incidental, he did not sustain the burden of proving that such services were substantial. Rather, he proved it was not substantial.

II.

Petitioner in his second question presents an issue which was not before the Court. Neither the United States District Court or United States Circuit Court of Appeals discussed whether an employee engaged both in Intrastate and Interstate Commerce was entitled to the provisions of the Act for only those hours he was engaged in Interstate Commerce. The only reason for mentioning how much time was so spent was to ascertain whether there was anything in the record to indicate it was substantial.

It is therefore earnestly urged that the decision of the United States Circuit Court of Appeals, that the burden was upon the Petitioner to prove that he and his principals were substantially engaged in Interstate Commerce; and

that from the Finding of Facts he had failed to sustain that burden is consistent with the decisions of this Court and does not present adequate questions for the issuance of the Writ, and therefore the Petition should be denied.

Respectfully submitted,

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